No. 80-771

SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

BURNHAM VAN SERVICE, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioner Household Goods Carriers' Bureau, Inc. (Bureau), as agent for its member motor common carriers of household goods, filed tariff schedules with the Interstate Commerce Commission increasing rates for the transportation of household goods nationwide by 5% (Pet. App. 1a-2a). Prior to the effective date of the rate increase, the Commission issued an order (Pet. App. 39a-40a) suspending the tariff schedules and instituting an investigation into the lawfulness of the rates, charges, and regulations in the proposed tariff schedules. The Commission order suspending the tariff schedules indicated concern with the tariff "insofar as it would increase present rates and charges by more than three (3) percent" (Pet. App. 39a).

The Bureau sent shippers a copy of the Commission's order, announced a 3% increase, and provided shippers with a "conversion chart" that they could use to calculate the rate at a tariff increased by 3% rather than at the published increase of 5%. The chart was not filed with the Commission, nor did the Bureau file with the Commission a new tariff schedule implementing a 3% rate increase. Nonetheless, carrier members of the Bureau began assessing shippers the 3% increase (Pet. App. 2a).

A shippers' association, the Aerospace Industries Association of America, Inc., challenged the Bureau's announcement of a 3% rate increase. The Bureau also petitioned the Commission for review of its suspension order (Pet. App. 2a). The Commission denied the Bureau's petition and clarified its suspension order by explaining (Pet. App. 41a) that "Commission practice and precedent is to suspend the proposed increase in its entirety, without prejudice to refiling at the [three percent] level * * *." Only then did the Bureau file tariff schedules to institute a 3% rate increase (Pet. App. 3a).

Thereafter, the Department of Defense sought from the Commission a declaratory order that Bureau members had overcharged shippers by collecting the 3% rate increase prior to the effective date of the 3% tariff schedule (Pet. App. 3a). The Commission found (Pet. App. 14a-15a) that the increased charges were overcharges because no formal tariffs had been on file clearly stating the rate charged. In a subsequent decision (Pet. App. 30a-34a), the Commission denied the Bureau's petition for reconsideration and, pursuant to a request by the General Services Administration, ordered Bureau members to identify and notify all shippers paying overcharges and to provide them with claim forms.[1]

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[1]Petitioners have not challenged the notification order in this Court (Pet. 5-6 n.1).

The court of appeals affirmed the Commission's orders (Pet. App. 1a-7a). The court held that the Commission, when it suspends a tariff, has no statutory authority to implement a different one and that, therefore, the entire 5% increase tariff schedule had been suspended from the outset (*id.* at 4a-5a). Because the Bureau did not file a new 3% increase tariff immediately following suspension of the 5% tariff, the tariff that was in effect prior to the 5% increase tariff remained in effect until the 3% increase tariff was properly filed (*id.* at 5a).

2. This case rests largely on its own peculiar facts. The decision below is correct, it presents no conflict among the circuits or with decisions of this Court, and it does not involve a legal issue of general importance warranting this Court's review.

Petitioners' principal argument rests on an asserted need to clarify whether the Commission can partially suspend a rate increase. Under the Interstate Commerce Act, 49 U.S.C. (Supp. III) 10101 *et seq.*, however, there is no question concerning the mechanism for filing a rate increase and the effect of a suspension order. As the court of appeals found (Pet. App. 4a):

> The Interstate Commerce Act sets out a series of steps a carrier must follow to effect an increase. They were not followed here.

There is no dispute regarding the Commission's authority to suspend a rate increase, thereby leaving the prior tariff in effect. See 49 U.S.C. (Supp. III) 10708; 49 C.F.R. 1307.13. The Commission may also indicate what would be an appropriate tariff when it rejects one as unreasonable. *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 653 (1978). The statute, regulations and case law clearly establish the procedures that must be followed in order to implement a rate increase after the Commission has suspended a proposed tariff.

Nothing in the statute allows the Commission to implement a rate other than the one proposed in the carrier's tariff by suspending the tariff "in part."[2] As the court of appeals recognized (Pet. App. 5a), a principal purpose of the Interstate Commerce Act's tariff system is to provide shippers and the public with certainty as to the applicable rates, by providing that the only legal rates are those set forth in public tariffs filed by the carrier and allowed to become effective by the Commission. That certainty would be undermined if, as petitioner contends, the Commission itself could implement some other rate simply by entering an order partially suspending a proposed tariff. Accordingly, in order for a carrier to implement a rate suggested by the Commission, it must file a tariff for that rate, which petitioners here failed to do.

Contrary to petitioners' suggestion (Pet. 7-8), neither *Trans Alaska* nor *United States* v. *Chesapeake & Ohio R.R.*, 426 U.S. 500 (1976) (*Chessie*), compels a different result. In *Chessie*, the Court approved of the Commission's "more measured course" of requiring, as a condition of not suspending and investigating a tariff, that railroads devote the additional revenues from the increases they had proposed to "delayed capital improvements" and "deferred maintenance." The railroads were required, however, to submit new tariffs imposing the condition on the increased revenues. 426 U.S. at 503, 515. In *Trans Alaska*, the Court approved a procedure whereby the Commission identified a tariff level that it would permit to go into effect in as little as one day *upon filing by the carriers* (436 U.S. at 637 & n.15, 653-654). Thus, the carriers in both *Chessie* and *Trans Alaska* were

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[2]While the Commission may prescribe a rate, it may do so only "after a full hearing," 49 U.S.C. (Supp. III) 10704(a)(1), and not in the context of informal suspension proceedings.

Moreover, the reference in 49 C.F.R. 1307.13 to "an order suspending a schedule in part" pertains to, *e.g.*, a tariff that includes a rate for transportation between Philadelphia and New York and a rate for transportation between Philadelphia and Chicago, where only the rate between Philadelphia and Chicago is suspended.

required to file new tariffs. Similarly, the carriers in these proceedings were required to file a new, 3% increase tariff.[3]

Petitioners nonetheless contend (Pet. 6-7) that the Commission should have the authority partially to suspend a rate increase (or decrease) in order to be able to meet an immediate and urgent need for an increase (or decrease) smaller than the entire amount sought. This claim ignores established Commission procedures that allow a rate increase or decrease to go into effect in less than 30 days. 49 U.S.C. (Supp. III) 10762(d)(1). See *Trans Alaska Pipeline System*, 355 I.C.C. 80, 87, appeal denied, 557 F. 2d 775 (5th Cir. 1977), aff'd, 436 U.S. 631 (1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[3]Nor does *Commonwealth of Pennsylvania* v. *ICC*, 561 F. 2d 278 (D.C. Cir. 1977), on which petitioners also rely (Pet. 9-10), avail them. In that case, the court upheld the Commission's authority to suspend a domestic (ICC-regulated) carrier's separately stated portion of a joint international rate in which unregulated carriers (ocean vessels) also participated. Unlike the joint rate tariff in that case, the tariff filed by the Bureau in this case was an integral whole, which, therefore, could not be partially suspended.